

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**SUBREGION 17**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO, DISTRICT 70 AND LOCAL  
LODGE 839 (SPIRIT AEROSYSTEMS)**

**Case 14-CB-133028**

**and**

**RYAN KASTENS, an Individual**

**and**

**SPIRIT AEROSYSTEMS**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE  
ADMINISTRATIVE LAW JUDGE**

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**I. STATEMENT OF THE CASE**

This case was heard by Administrative Law Judge Michael A. Rosas on February 19-20 and 26-27, 2015, in Wichita, Kansas, based on a complaint alleging that International Association of Machinists and Aerospace Workers, AFL-CIO, District 70 (District 70) and Local Lodge 839 (Local 839) (collectively Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act by threatening Ryan Kastens with bodily injury and by threatening to impede his efforts to obtain reinstatement; violated Section 8(b)(1)(A) and (2) by attempting to cause and causing Spirit to discharge Ryan Kastens and Jarrod Lehman; and violated Section 8(b)(1)(A) by discriminatorily processing Kastens' grievances.

As described below, record evidence clearly demonstrates that Respondent violated the Act as alleged. As a result of Kastens' and Lehman's dissident activity, Respondent attempted to cause and, eventually did cause their employer, Spirit Aerosystems, Inc. (Spirit), to discharge them. Credible evidence not only demonstrates that, on January 27, 2014, Respondent's agent Howard Johnson initiated an investigation into Kastens' and Lehman's e-mail activities without any legitimate reason to explain his action, but it also clearly shows that Johnson's action was but one of several attempts by Respondent's representatives to get Spirit to initiate an investigation into Kastens' and Lehman's activities. Thereafter, on April 11, 2014, Johnson and a number of Respondent's other representatives attempted to interfere with Kastens while he campaigned on behalf of rival Presidential candidate Jay Cronk at Spirit's facilities. Respondent's representatives not only called Spirit's security officers to have Kastens' removed from Spirit's property, but, as alleged in the Complaint, Johnson also threatened to physically assault Kastens and threatened his ability to obtain reinstatement with Respondent. Finally, credible demonstrates that Respondent discriminatorily and arbitrarily processed Kastens'

outstanding suspension and discharge grievances because of his dissident activities. Although Kastens had three outstanding grievances, the record clearly establishes that Directing Business Representative Frank Molina made no sincere effort to investigate and resolve Kastens' grievances, instead abandoning them in exchange for a small monetary payment while withholding evidence from Kastens and Respondent's legal counsel.

## II. STATEMENT OF FACTS

### *A. Respondent's Organization*

International Association of Machinists and Aerospace Workers District 70 represents employees at approximately twenty companies across the state of Kansas. *T.* 25. Together with Local Lodge 839, District 70 represents a bargaining unit of approximately 7,000 employees at a facility operated by Spirit in Wichita, Kansas. *T.* 26-28. District 70 and Local Lodge 839 jointly administer a collective-bargaining agreement covering the Spirit employees' terms and conditions of employment. *Id.* The current collective-bargaining agreement became effective on June 26, 2010, and remains in effect until June 27, 2020. *T.* 27; *Jt.* 1.

President and Directing Business Representative Frank Molina is District 70's presiding officer. *T.* 25. Molina is assisted by Becky Ledbetter, whom he appointed as Assistant Directing Business Representative following his election, Secretary-Treasurer Lynne Strickland, six business representatives, and two organizers. *T.* 26. In addition to a group of local officers, Local 839 maintains two in-plant representatives who report directly to District 70 and are responsible for processing Spirit employees' grievances at the early stages of the grievance process. *T.* 31, 288-289. Tim Johnson is the first shift in-plant representative, and Howard Johnson served as the

second shift in-plant representative until Molina appointed him to be an organizer in March 2014. *T. 288.*

***B. Kastens' and Lehman's Dissident Activity***

Ryan Kastens and Jarrod Lehman were each employed by Spirit. *T. 28, 126, 233.* Kastens began his employment on January 8, 2010, and held the classification of fuel cell sealer. *T. 126.* Lehman began his employment on October 26, 2007, and worked as an underwing mechanic. *T. 233.*

Throughout their employment with Spirit, Kastens and Lehman were active members of District 70 and Local Lodge 839. *T. 28, 126, 233.* Kastens served as a union steward throughout 2012 and held positions on various union committees. *T. 127, 176.* During his employment, Lehman served as Local 839's President and Vice President, and, following an appointment by Molina's predecessor, Steve Rooney, served as a Joint Partnership Advocate, where he reported to the Directing Business Representative, first Rooney and then Molina. *T. 236-240.*

By January 2014, Kastens and Lehman had each taken political positions that were squarely at odds with Respondent's incumbent leadership. Whereas Lehman attempted to unseat Howard Johnson as Local 839's in-plant representative during the 2013 elections, Kastens had become an advocate for the reform slate of candidates in the impending Machinists' International Election. Furthermore, according to Molina, Kastens had become an outspoken critic of District 70's organizing policies. *T. 89.*

Kastens' dissident activity began to take form in November 2013, when Karen Ascension, a vice presidential candidate in the Union's International election, attended a meeting at Local 839 to speak on behalf of the reform candidates. *T. 154.* Kastens attended the meeting

along with the staffs of District 70 and Local Lodge 839 and, for the first time, learned that Jay Cronk was attempting to unseat Machinist's International President Thomas Buffenbarger in the upcoming election. *T.154*. Although Kastens was impressed by Ascension's presentation, his opinion was not universal. Howard Johnson interrupted Ascension's presentation, yelling at Ascension and imploring her to leave because she would not be receiving the union members' support. *T. 154-155*. Although Kastens attempted to intervene and escort Johnson from the building, Johnson refused and continued to interfere with Ascension's presentation. *T. 154-155*. Following the meeting, Kastens met with Directing Business Representative Molina and advised him that he felt that Johnson's actions were inappropriate. Although Kastens asked Molina to address the matter with Johnson, it is not clear whether Molina ever spoke with Johnson about his actions. *T. 155*.

Soon thereafter, however, Molina began communicating with Kastens about his support of Ascension and Cronk, whom Kastens began communicating with on Facebook. *T. 205*. In early December 2013, Molina sent a text message to Kastens telling him that he heard that Kastens was campaigning for Ascension. *T. 156*. Although Kastens acknowledged taking Ascension's campaign literature, he denied campaigning for her. *T. 156*. Several weeks later, Molina called Kastens and again reported hearing rumors that Kastens was supporting Ascension and Cronk. Although Molina described the reform candidates in unflattering terms, Kastens responded that he had the right to support the candidates, and Molina could not tell him otherwise.<sup>1</sup> *T. 157*.

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<sup>1</sup> Although Molina denied warning Kastens against supporting Cronk and Ascension, he admitted that in November or December 2013, he learned that Kastens supported the reform candidates. *T. 94-95, 559*.

As addressed in greater detail below, Respondent's animosity toward Kastens' activity was clearly demonstrated on April 11, 2014,<sup>2</sup> when Kastens accompanied Jay Cronk to Spirit's facility to distribute campaign material. *T. 157, 205-207*. After Kastens and Cronk arrived at Spirit and began distributing literature in support of Cronk's Presidential bid, Howard Johnson and a number of District 70 representatives arrived at the gate and attempted to interfere with Kastens' and Cronk's activity. *T. 157-159, 207-209*. When Kastens asked Howard Johnson to leave Cronk alone, Johnson threatened to beat Kastens' ass and told Kastens that he would see that Kastens never got his job back. *T. 159, 209*. Although Kastens' and Johnson's confrontation did not escalate to a physical confrontation, on April 14 Kastens went to the Sedgwick County Courthouse and filed a petition for a temporary restraining order against Johnson, obtaining a Final Order of Protection from Stalking against Johnson on May 1. *T. 163-164, 167-168; GC 4; GC 5*.

As with Kastens, Howard Johnson was well known to Lehman even before Johnson reported his e-mail activity to Spirit in January 2014. Lehman served as a steward for Local 839 from 2008 until 2011, and during this period he worked directly with Johnson in his role in-plant representative. *T. 234-235*. Although Lehman initially enjoyed a good relationship with Johnson, he perceived a change in their relationship during his term as Vice President.<sup>3</sup> *T. 235*. On one occasion, while Johnson and Lehman were discussing an issue at Local 839's office, Lehman addressed their icy relationship, asking Johnson to explain why he had a problem with him. *T.*

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<sup>2</sup> Unless otherwise indicated, all dates reference 2014.

<sup>3</sup> Lehman was Vice President of Local 39 from January 2012 until June or July 2013. *T. 236*.



235. In response, Johnson claimed full responsibility for Lehman's success within Respondent's organization and accused Lehman of being a cocky little shit.<sup>4</sup> *T.* 235.

In June or July 2013, Lehman attempted to unseat Johnson as in-plant representative at the request of Steve Rooney, Frank Molina's opponent in the election for Directing Business Representative. *T.* 236-237. Although Molina and Johnson prevailed in the election, Lehman remained in his position as Joint Partnership Advocate and began reporting to Molina.<sup>5</sup> *T.* 237-238. Lehman soon resigned from the position, however, because Molina refused to return his calls. *T.* 239.

***C. Kastens' and Lehman's Suspension and Discharge***

On January 27, Lehman received an e-mail, which was captioned, "Why you should always look both ways." The e-mail included a video showing a collision between a vehicle and a scooter on a street directly adjacent to one of Spirit's parking lots. *T.* 249; *Jt.* 20; *GC* 8; *GC* 24. Lehman forwarded the e-mail to six or seven employees including Kastens and also copied two individuals outside Spirit. *T.* 259; *GC* 8; *GC* 24. Upon receiving Lehman's e-mail, Kastens forwarded the e-mail and video to numerous fellow employees, several union members, and his immediate family, adding the remark, "Wonder why those of us here at spirit never heard about this...." *T.* 150; *GC* 8; *GC* 24.

Upon receiving Kastens' e-mail, Assistant Directing Business Representative Ledbetter forwarded the e-mail to Respondent's representatives Jason Baze, Howard Johnson, and Kenneth Tullis. *T.* 324-326, 334; *GC* 24; *R* 12. After viewing the video, Howard Johnson then sent the e-

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<sup>4</sup> Counsel for the General Counsel moves to correct the transcript at page 235, line 19, to reflect that Johnson called Lehman a cocky little shit instead of a "coffee" little shift. Johnson did not deny making these remarks.

<sup>5</sup> Contrary to Molina's unsupported testimony, Lehman testified that he was never fired by Rooney or appointed by Molina. *T.* 238.

mail and video to Jeff Black, a Spirit labor relations representative, adding the note, "We were told that this video shouldn't have been released....im getting calls about this, people are forwarding this message internally as well as outside spirit. What is the deal with this video?" *T. 291-294; GC 8*. Spirit's records demonstrate that Black forwarded Johnson's inquiry to Spirit's Senior Manager Lisa Atcheson, who in turn contacted Spirit's Security Department to initiate an investigation. *GC 8; T. 274-278, 329*.

Near the end of Kastens' shift on February 13, Spirit suspended him and escorted him from its property. *T. 29, 143-144*. The following day, Lehman was also suspended. *T. 29, 240*.

Kastens and Lehman both filed grievances concerning their suspensions on February 14. *Jt. 6; Jt. 15*. Although Kastens did not speak with a business representative when he initially filed his grievance at District 70's office, Directing Business Representative Molina sent Kastens a text message on February 15, informing Kastens that he was attempting to learn the reason that he had been suspended. *T. 145-147*. Lehman spoke with Becky Ledbetter when he filed his grievance, and, although Ledbetter advised Lehman that she did not know why he had been suspended, she promised that Respondent's representatives would get to the bottom of it. *T. 241, 265*.

Late the following week, Kastens finally gained some insight into the basis for his suspension when Molina called him and informed him that his suspension involved an e-mail incident involving over thirty people. *T. 148*. Although Molina did not further elaborate, he promised Kastens that he would contact him with any further details. *T. 148*.

Lehman finally learned about the reason for his suspension on February 24, when he attended a meeting at Spirit's security office. *T. 241*. Spirit's security officers showed Lehman a

copy of his e-mail, interviewed him, and Lehman signed a typed statement in which he acknowledged sending the video to employees and individuals outside of Spirit. *T. 241-244; GC 20*. Members of Spirit's security department subsequently interviewed Kastens on February 25 about his involvement in forwarding the video. *T. 149-150*. Like Lehman, Kastens provided a signed statement in which he acknowledged his actions. *GC 2*.

Following their interviews, Lehman and Kastens continued serving their suspensions. During this period, a member of Spirit's security office telephoned Lehman, and, about March 3, Lehman submitted to a second interview. *T. 244-245; GC 13*. Lehman's second interview focused on a comment and a picture that he posted on his personal Facebook account. *T. 245*. Although Lehman acknowledged posting a comment that asked if he needed to cut somebody, he could not recall any specifics about the comment other than that it was not work related or anything other than a figure of speech. *T. 245, 263-264*. Although Lehman searched his Facebook account to identify the photograph in question, he was unable to do so and informed the officer of that fact. *T. 245*.

Spirit's security office subsequently issued a report concerning the allegations that Kastens and Lehman sent a Spirit video to individuals outside of Spirit. *GC 8; T. 274-278, 329*. Thereafter, Spirit's security office issued a second report "based on information received by the HR Discipline Office February 28, 2014" concerning two posts on Lehman's personal Facebook account that had been received "from a person wishing to remain anonymous." *GC 13*.

As a result of the investigations, Spirit discharged Kastens and Lehman on March 5 and 6, respectively. Kastens' discharge notice provides:

Ryan, an investigation has revealed that you forwarded an e-mail external to the Company which contained a Spirit video. This behavior is unacceptable and will

not be tolerated.... Ryan, on 12/6/13 you were issued a suspension which indicated that if you received any type of discipline in the next 12 months, you would be terminated for generally acceptable conduct. As a result of this investigation, your employment with Spirit Aerosystems, Inc. is terminated effective immediately. *T. 151; Jt. 7.*

Lehman's discharge notice provides:

Jarrold, an investigation revealed that you forward[ed] an e-mail external to the Company which contained a Spirit video. You also had a picture posted on your Facebook account of you which was taken in a Spirit shop area. This behavior is unacceptable and will not be tolerated.... Jarrold, as a result of these investigations, you are being terminated. *Jt. 9.*

#### ***D. The Disposition of Kastens' and Lehman's Grievances***

Directing Business Representative Molina assumed responsibility for processing Kastens' and Lehman's grievances even before their suspensions were converted to terminations.<sup>6</sup> *T. 36, 87.* On February 27, Molina submitted written requests for information concerning Kastens' and Lehman's grievances to Spirit's Director of Labor Relations Jeff Clark.<sup>7</sup> *T. 37, 40, 548-550; GC 7.* Clark responded to Molina's requests by email dated March 13, indicating that he had responsive information. *GC 9; T. 41-42.* Molina subsequently met with Clark and received the requested information.<sup>8</sup> *T. 42.*

After receiving the information concerning Kastens' and Lehman's discharges from Spirit, Molina instructed his assistant to send his entire grievance file to District 70's attorney Tom Hammond, and Molina asked Hammond to review the documents. *T. 86-87, 496, 553.*

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<sup>6</sup> Molina's conflicting testimony concerning when he assumed responsibility for Kastens' grievance will be addressed in greater detail below.

<sup>7</sup> Molina's assistant sent courtesy copies of his request to among others Becky Ledbetter. *T. 38.*

<sup>8</sup> Although Molina acknowledged receipt of the Spirit security office report concerning Lehman's Facebook activity (GC 13) along with the report concerning Kastens' and Lehman's e-mail activity, *T. 66-67*, he testified that the report concerning the employees' e-mails did not include the page demonstrating that Howard Johnson was responsible for transmitting Kastens' and Lehman's e-mails to Spirit (GC 17). *T. 48-54, 83.* Instead of showing that Johnson sent Kastens' and Lehman's e-mails to Spirit, the report included the handwritten notation "Deleted Source Material." *T. 49, 57, 83; GC 17.*

Thereafter, sometime before April 1, Hammond contacted Molina and offered his opinion on the merits of Kastens' and Lehman's grievances. *T.* 493. After speaking with Hammond, Molina independently reviewed past arbitration decisions concerning last chance agreements and determined that District 70 would not pursue Kastens' grievance to arbitration. *T.* 73, 74, 97, 114-116, 554-555; *R* 11.

In late March, Molina turned his attention to attempting to settle Kastens' and Lehman's grievances. *T.* 73, 555. Molina testified that he initially tried to get Spirit to have mercy on Kastens and Lehman. To that end, Molina met with Labor Relations Manager Clark and Vice President Justin Welner to determine whether Spirit was serious about discharging them. *T.* 74-76, 100-102, 562, 569-570. After Spirit rejected Molina's requests for reinstatement and his appeal for last chance agreements, Molina offered to resolve the grievances in exchange for payment of \$50,000 to each employee. *T.* 76, 99-100, 562-563. According to Molina, Spirit rejected his offer, thereby leading to negotiations that ultimately led to the final settlement. *T.* 76, 562-563.

By May 8, Molina and Spirit reached agreements to resolve Kastens' and Lehman's grievances. *T.* 77-78; *GC* 15, *p.* 1. Although Spirit proposed seeking Kastens' and Lehman's signatures on the agreements to "take[] away the risk of any future liability for both our organizations," after sending the agreement to Molina for his approval, Spirit agreed to remove the grievant releases so that Kastens and Lehman would not be required to sign the settlement agreements. *T.* 77-78; *GC* 15, *pp.* 1-2. Once the agreements were finalized, Molina sent the settlements to Kastens and Lehman by mail on May 23. *T.* 80, 152; *Jt.* 8. As a result of the settlement, District 70 withdrew Kastens' and Lehman's grievances, and Spirit paid Kastens \$2,000 and Lehman \$5,000. *T.* 152.

Upon receiving his settlement check, Kastens immediately called Molina, informing Molina that he was not happy and that he wanted his grievance to proceed to arbitration. *T. 153.* Molina replied that it would be a waste of time because Kastens signed a last chance agreement. *T. 153.*

### **III. ARGUMENT AND ANALYSIS**

#### ***A. Statement of the Issues***

Credibility resolutions will be a vital factor in determining whether Respondent violated the Act, as alleged in the Complaint. Although there are a number of facts that are not in dispute, the context surrounding Respondent's actions are critical to analyzing whether Respondent threatened Kastens in violation of Section 8(b)(1)(A); whether Respondent attempted to cause and caused Spirit to discharge Kastens and Lehman in violation of Section 8(b)(1)(A) and (2); and whether Respondent violated Section 8(b)(1)(A) by accepting a small monetary offer to abandon Kastens' outstanding grievances. Although Respondent's witnesses either denied the allegations or attempted to cast their actions in a nondiscriminatory light, the overwhelming weight of the evidence demonstrates Respondent's lack of good faith and clear hostility toward Kastens and Lehman. As explained below, the record clearly establishes that Respondent threatened Kastens because he was engaged in protected activity, attempted to cause and caused Spirit to discharge Kastens and Lehman, and acted in bad faith in refusing to process Kastens' grievances.

***B. Respondent Violated Section 8(b)(1)(A) by Threatening Kastens***

**1. Credible Evidence Demonstrates that Howard Johnson Threatened Kastens**

On April 11, Jay Cronk arrived in Wichita and met Kastens, who agreed to show him a place to handbill at Spirit's facility. *T. 205-206*. Kastens and Cronk traveled to an entrance gate at Spirit's property at approximately 1:00 or 1:30 p.m., stationed themselves on opposite sides of the gate, and began distributing campaign literature to employees. *T. 157, 206-207*. Approximately thirty minutes after Kastens and Cronk arrived, District 70 representatives Howard Johnson, Becky Ledbetter, and Juan Eldridge also arrived at the gate. *T. 157-158*. Ledbetter approached Kastens and began speaking to him about his decision to support Cronk. After telling Ledbetter that he had the right to campaign for his candidate, Kastens left his station to attend to Cronk, who was involved in an exchange with Johnson and Eldridge on the other side of the entrance gate. *T. 158*. Upon arriving at the other side of the gate, Kastens initially exchanged peaceful remarks with Eldridge while Johnson continued addressing Cronk less peacefully. *T. 158-159, 189*. Thereafter, Kastens approached Johnson and advised him that he was interfering with Cronk's lawful campaign activity. *T. 159*. Johnson responded, telling Kastens to "[s]hut up before I beat your ass." Johnson then told Kastens that he would never be anything in the Union and that he would see that Kastens never got his job back. *T. 159, 189, 209*. In response to Johnson's remarks, Kastens placed his hands behind his back and implored Johnson to hit him. *T. 159, 209*. Before the communications between Johnson and Kastens devolved further, District 70 Joint Partnership Advocate Austin Ledbetter interceded and separated Kastens and Johnson. *T. 159*. Kastens then stepped away from the situation and called the Department of Labor to report the incident. *T. 160*. Shortly thereafter, a Spirit security

officer arrived at the scene, and informed Kastens and Cronk that they needed to remove their cars from Spirit's parking lot. *T. 160, 209-210.*

## **2. Respondent's Evidence Does Not Corroborate Johnson's Denials**

Although no one disputes that Kastens and Johnson engaged in a confrontation on April 11, Respondent called a number of witnesses in an effort to contradict Kastens' and Cronk's testimony that Johnson threatened Kastens. For his part, Johnson denied that he threatened Kastens in any manner, *T. 305-306*. According to Johnson, Kastens approached him from the opposite side of the entrance gate, got in his face, and without any provocation began yelling, "Hit me, hit me, hit me, got my hands behind my back. Hit me, hit me, hit me, hit me." *T. 304, 306-307*. Johnson thereafter responded to Kastens' pleas by telling him, "I will get you – you know.... I'm not hitting you. I'll see you tomorrow." *T. 304-305*.

Despite the number of Respondent's representatives who claimed that they did not hear Johnson threaten Kastens, none of them explicitly contradicted Kastens' testimony that Johnson threatened him. District 70 Business Representative Juan Eldridge, who traveled to Spirit with Johnson and Ledbetter, testified that he was speaking with another employee when he first noticed the altercation between Johnson and Kastens, and he did not hear what, if anything, was said before he heard Kastens daring Johnson to hit him. *T. 407-408, 410-411*. According to Becky Ledbetter, once Kastens ventured to the opposite side of the entrance gate to speak with Johnson, she could not hear them. *T. 364-367, 374-375*. District 70 Business Representative Stephen Elder testified that, when he arrived at Spirit and began walking toward the entrance gate, he observed Johnson and Kastens standing approximately 15 feet apart while Kastens challenged Johnson to hit him and Johnson yelled that Kastens was not allowed on Spirit's



property. *T. 420-421*. District 70 Business Representative Brent Allen also observed Kastens and Johnson engaged in a discussion when he arrived at Spirit, and, although he was not close enough to hear what Johnson said to Kastens, he observed Kastens yelling at Johnson to hit him. *T. 430-432, 435*. Like Respondent's other witnesses, Austin Ledbetter also saw Kastens and Johnson exchange words before he observed Kastens place his hands behind his back and implore Johnson to hit him. *T. 443-445*.

In addition to being unable to rebut Kastens' testimony, none of Respondent's other witnesses' testimony support Johnson's claim that he did not do or say anything to provoke Kastens' reaction. Furthermore, considering the discrepancies in recollection between Respondent's witnesses, one would be hard pressed to conclude which one of Respondent's witnesses to credit even if they had contradicted Kastens. For example, whereas Eldridge testified that Kastens spoke with him before Kastens began speaking with Johnson, *T. 403-404, 407, 413*, both Johnson and Becky Ledbetter testified that Kastens immediately approached Johnson.<sup>9</sup> *T. 303-304, 306-307, 363-364*. Although other witnesses placed Kastens and Johnson face to face, Stephen Elder testified that Kastens and Johnson were approximately 15 feet apart when Kastens began telling Johnson to hit him. *T. 420*. And, even though Johnson claimed that he did not do anything to provoke Kastens, and Eldridge testified that Johnson stood calmly with his thumbs in his pockets as Kastens yelled at him, *T. 307, 408, 411*, former District 70 Joint Partnership Advocate Austin Ledbetter acknowledged that tensions were running high between Kastens and Johnson to the point that he felt it necessary to diffuse the situation. *T. 442, 453*.

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<sup>9</sup> Ledbetter testified that Kastens crossed five lanes of traffic and "zeroed in on [Johnson] and there was no turning back." *T. 364*.

### **3. Independent Evidence Demonstrates that Johnson Threatened Kastens**

Ultimately, the weight of the evidence supports Kastens' testimony that Johnson threatened him. Aside from the inherent implausibility of Johnson's claim that he did not say or do anything to provoke Kastens' response, credible evidence disputes his claim. Contrary to Johnson's testimony that Kastens' reaction was completely unprovoked, Spirit's Lead Security Officer Gerald Randolph testified that, when he arrived at the gate, he witnessed Johnson and Respondent's other representatives making comments toward Kastens, who remained silent except when addressing Randolph. *T. 477, 479-480.*

More significantly, to credit Johnson's claim that he did not do or say anything to provoke Kastens one must also believe his assertion that he went to Spirit for the sole purpose of campaigning. *T. 307.* This is clearly not true, as Respondent's representatives clearly went to Spirit to interfere with Kastens' and Cronk's activities. To his credit, Austin Ledbetter admitted this fact, explaining that he went to Spirit because he received several calls reporting that Kastens was at Spirit campaigning. *T. 447-448, 450-451.* Ledbetter not only immediately traveled to Spirit in response to the news, but he also called Spirit's Security Office twice in an effort to have Kastens and Cronk removed from Spirit's property. *T. 451-452.*

Although none of Respondent's other witnesses admitted the real reason that a large number of District 70 officers simultaneously arrived at Spirit while Kastens and Cronk were attempting to distribute campaign literature, their motive becomes clear when one considers their actions after Cronk and Kastens left the area and began walking toward their vehicles. Brett Allen and Austin Ledbetter testified that they stuck around to observe Kastens and Cronk to make sure that they left Spirit's property. *T. 435-437, 447-448.* Becky Ledbetter testified that she

immediately departed along with Johnson and Eldridge. *T.* 375. Likewise, despite having just arrived at Spirit, Stephen Elder simply got in his vehicle and left after Kastens and Cronk departed.<sup>10</sup> *T.* 422, 426.

It is also notable that within days of the incident, Kastens went to the Sedgwick County Courthouse and filed a petition for a temporary restraining order against Howard Johnson, and, thereafter obtained a Final Order of Protection from Stalking to prohibit Johnson from communicating with him. *T.* 163-164, 167-168; *GC* 4; *GC* 5. Considering that Kastens had not filed an unfair labor practice charge against Respondent at the time he sought the protective order, his actions corroborate his testimony that Johnson threatened to “beat his ass” and ensure that he did not get his job back.

#### **4. Johnson's Threats Are Attributable to Respondent**

In determining whether statements violate Section 8(b)(1)(A), the Board uses an objective test and does not attempt to discern whether the employee was actually coerced or restrained by the alleged threats. See *Steel Workers Local 1397*, 240 NLRB 848, 849 (1979). A threat of physical violence is clearly conduct which is likely to coerce and restrain employees in the exercise of their Section 7 rights. See *YKK (U.S.A.) Inc.*, 268 NLRB 82 (1984) (sustaining objections based on threats of physical violence by union representatives during the critical period); *Electrical Workers Local 309*, 212 NLRB 409, 414 (1974) (finding violation of 8(b)(1)(A) based on threats of violence directed at traveler). Likewise, a union violates Section 8(b)(1)(A) when an agent threatens to seek the discharge of an employee or tells an employee

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<sup>10</sup> Although Elder testified that he left the gate because shift change was over, *T.* 426, Ledbetter testified that the District 70 officers left the area because security instructed them to leave. *T.* 375. In addition to contradicting Elder, Ledbetter's testimony contradicts Security Officer Randolph's testimony that, although he instructed Kastens to remove his vehicle from Spirit's parking lot, the District 70 officers had the right to remain. *T.* 475-476, 478-479.

that the union will not represent him if he files a grievance. See *Steel Workers Local 1397*, 240 NLRB at 849; *Teamsters Local 886*, 229 NLRB 832, 832-833 (1977).

Viewed objectively, Johnson's statements clearly sought to coerce and intimidate Kastens because of his support for Cronk. Until Johnson and the other District 70 representatives arrived at Spirit's entrance gate, Kastens was merely engaged in peaceful campaign activity on behalf of a rival candidate.<sup>11</sup> It does not matter whether Kastens honestly feared a physical altercation with Johnson; Johnson's threats were objectively coercive and clearly intended to interfere with Kastens' campaign activity.

Furthermore, Johnson clearly made the threatening remarks in his capacity as Respondent's agent. The Board broadly construes agency principles and will find that individuals are union agents when they have authority to discuss employee complaints with management, write and resolve grievances, and generally serve as the union's liaison to employees and the employer. See *Electrical Workers Local 357 (Newtron Heat Trace, Inc.)*, 343 NLRB 1486, 1498 (2004). As an in-plant representative, Johnson had authority to resolve grievances, and, in fact, testified that he previously resolved at least one grievance on Kastens' behalf. *T.* 288-289, 299-302, 310. Even though Johnson was promoted in March 2014, he remained in District 70's employ as an organizer and liaison, working directly for Directing Business Representative Molina. *T.* 98, 288. It is also worth noting that Johnson arrived at Spirit's property along with Assistant Business Representative Ledbetter and nearly every other District 70 representative. Thus, even assuming that Johnson was not acting within the scope of his authority when he threatened Kastens, the circumstances clearly demonstrate that Kastens

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<sup>11</sup> Contrary to Respondent's suggestion, dissident union activities are protected conduct. See, e.g., *SPFPA Local 444*, 360 NLRB No. 57, slip op. at 6. Furthermore, there is no credible evidence that Kastens' activities became unprotected either because he provoked Johnson or, assuming that Respondent has a genuine interest in guarding Spirit's property, because he parked his car in Spirit's parking lot or otherwise ventured onto Spirit's property.

had every reason to believe that Johnson was speaking for Respondent. See *Electrical Workers Local 45*, 345 NLRB 7, 7 (2005) (explaining that apparent authority is established when representatives are “cloaked [ ] with sufficient authority to create a perception among the rank-and-file that [they act] on behalf of the union”); see also *Teamsters Local 886*, 229 NLRB at 833.

For the forgoing reasons, the record clearly demonstrates that Johnson violated Section 8(b)(1)(A) through his threat of physical violence and by threatening to ensure Kastens' continued unemployment because of Kastens' dissident union activity.

### ***C. Respondent Attempted to Cause and Caused Kastens' and Lehman's Discharge***

#### **1. Legal Framework**

A union violates Section 8(a)(2), and derivatively violates Section 8(b)(1)(A), when it attempts to cause an employer to discipline bargaining unit employees because of their dissident union activities. See *Security Police and Fire Professional of America (SPFPA) Local 444*, 360 NLRB No. 57, slip op. at 6 (February 28, 2014). As the Board recently observed, it has been somewhat inconsistent in expressing the appropriate analytical framework in such cases, applying a duty-of-fair-representation framework in some, and the burden-shifting analysis from *Wright Line*<sup>12</sup> in others. See *Good Samaritan Medical Center*, 361 NLRB No. 145, slip op. at 2 (December 16, 2014).

Under the duty of fair representation analysis, the Board applies a rebuttable presumption that a union violates the Act by causing the discharge of a bargaining unit employee, and permits the union to rebut the presumption by demonstrating that it acted in accordance with a valid union security clause or in a manner that was necessary to effectuate the performance of its

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<sup>12</sup> 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

function of representing its constituency. See *Acklin Stamping Co.*, 351 NLRB 1263, 1263 (2007), citing, inter alia, *Graphic Communications Workers Local 1-M (Bang Printing)*, 337 NLRB 662, 673 (2002). See also *Operating Engineers Local 18*, 204 NLRB 681, 681 (1973) enf. denied on other grounds 496 F.2d 1308 (6<sup>th</sup> Cir. 1974). Under the *Wright Line* analysis, the General Counsel must first prove, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor in the union's adverse action by demonstrating that the employees engaged in protected activity, the union had knowledge of that activity, and the union possessed animus against the employees' protected conduct. A union may rebut the General Counsel's showing by demonstrating that it would have taken the same action absent the employees' protected activity.

## **2. Kastens' and Lehman's Dissident Activities Motivated Respondent's Actions**

Regardless of which framework one uses to analyze Respondent's actions, the evidence clearly establishes that Respondent retaliated against Kastens' and Lehman because of their protected activity. Respondent did not dispute having knowledge of Kastens' and Lehman's dissident conduct, and Respondent -- particularly Howard Johnson -- clearly exhibited animosity toward Kastens' and Lehman's activity. Thus, it is appropriate to consider whether Respondent had a nondiscriminatory reason for its actions.

Respondent's witnesses contended that Howard Johnson acted in good faith when he informed Spirit about the video attached to Lehman's and Kastens' e-mails. It appears that Respondent's argument is twofold: (1) Johnson's actions were necessary to represent the bargaining unit; and (2) Johnson did not actually intend to cause Spirit to discharge Kastens and Lehman or even know that he was reporting them to Spirit because he did not actually look to

see who initiated the e-mail chain. Contrary to Respondent's arguments, the record establishes that Respondent's representatives clearly intended to initiate disciplinary action against Kastens and Lehman because of their dissident activity. Accordingly, under either analytical framework Respondent has not carried its burden.

### **3. Respondent's Actions Were Not Necessary to Represent the Bargaining Unit**

According to Howard Johnson and Becky Ledbetter, they were not even aware of the automobile accident captured in the video forwarded by Kastens and Lehman (Jt. 20) until they received Kastens' e-mail on January 27. *T. 290-291, 323-324, 337-338*. Although Johnson and Ledbetter contend that Johnson ultimately forwarded Lehman's and Kastens' e-mails to Spirit because they were getting so many calls about it from bargaining unit employees, *T. 291-292, 336-338*, the record overwhelmingly demonstrates that their testimony should not be taken at face value.

Despite testifying that he received multiple calls about the video's release, Johnson was unable to specifically recall any conversation with a bargaining unit employee, and he did not provide any records to show that anyone other than Ledbetter contacted him. *T. 291-292*. For her part, Ledbetter was able to name only a single bargaining unit employee, Reginald Maloney, who contacted her. *T. 336-337*. Although Maloney acknowledged that he contacted Ledbetter because he was surprised to see the video circulating by e-mail, *T. 388*, his testimony otherwise contradicts Respondent's assertion that Johnson sent the video to Spirit as a means of representing Respondent's constituency.

Maloney was unsure about the date he first saw the video and could not recall when he contacted Ledbetter. *T. 395, 397*. Even assuming that Maloney immediately contacted Ledbetter

once he saw the video, the record fails to support Ledbetter's assertion that Maloney contacted her late in the evening on January 27 before she forwarded Lehman's and Kastens' e-mails to Johnson. *T.* 336. Neither Lehman nor Kastens sent the video to Maloney or Terry Flynn, the employee who first showed Maloney the video. *T.* 376, 395-396; *R.* 12; *GC* 24. Although Maloney could not pinpoint the date on which he first saw the video, he recalled first viewing the video at work between the hours of 7:00 a.m. and 4:00 p.m. *T.* 386-387, 395-397. Kastens, however, did not send the e-mail to Ledbetter until 7:17 P.M. on January 27, and, Ledbetter sent the e-mail to Johnson only two hours later. *R.* 12; *GC* 24. Thus, Maloney either saw the video sometime after January 27, or viewed a copy of the video that was disseminated by someone other than Kastens. Either way, the evidence does not support Respondent's assertion that Johnson sent Kastens' and Lehman's e-mails to Respondent in response to bargaining unit employees' inquiries.

Even if one assumes-- contrary to record evidence -- that Ledbetter and Johnson actually received a call about the video between 7:17 p.m., when Kastens transmitted the video to Ledbetter, and 9:18 p.m., when Ledbetter sent the e-mail to Johnson, there is no evidence that they had a representational basis for sending Lehman's and Kastens' e-mails to Spirit. Respondent's witnesses did not articulate a single reason to explain how Johnson's actions served the bargaining unit. There is no evidence that Roger White, the driver of the scooter involved in the accident, complained about the video. In fact, as noted above, none of Respondent's witnesses even knew that White had been involved in an accident until sometime after they viewed the video.<sup>13</sup> *T.* 290-291, 323, 395. Maloney, the sole bargaining unit employee who acknowledged contacting one of Respondent's representatives, testified that he could not

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<sup>13</sup> One could not reasonably claim to have been able to have identified that White was driving the scooter based on reviewing the video alone. *Jt.* 20.



recall any particular reason why the video concerned him, explaining only that he contacted Ledbetter because he thought that it was strange that the video was circulating by e-mail. *T.* 389, 393. Despite Respondent's attempt to elicit testimony that Maloney contacted Ledbetter because of his own checkered driving history, his testimony simply does not support this assertion. *T.* 391-392. Furthermore, although Ledbetter and Johnson claimed that numerous employees called them to report the video, there is no evidence concerning the phantom calls and no evidence of a legitimate explanation for Johnson's inspiration to forward Kastens' and Lehman's e-mails to Spirit. Accordingly, Respondent's evidence fails to demonstrate that Respondent sent Kastens' and Lehman' e-mails to Spirit to represent bargaining unit employees.

**4. Respondent's Discriminatory Motive is Established by Its Multiple Attempts to Initiate Investigations Against Lehman and Kastens**

In concluding that Respondent discriminatorily caused Kastens' and Lehman's discharge, one is not necessarily required to rely simply on Respondent's failure to articulate a reason for Johnson's decision to send Kastens' and Lehman's e-mails to Spirit. Rather, the record clearly demonstrates that Johnson's decision to send Spirit a copy of Kastens' and Lehman's e-mail was but one instance in a pattern of activity by Respondent's representatives to attempt to get Spirit to investigate and discipline Lehman and Kastens. Considered in context with Respondent's other actions involving Kastens and Lehman, it is clear that Johnson did not send their e-mails to Spirit for any legitimate purpose.

On January 13, Ledbetter e-mailed Spirit's Labor Relations Manager Jeff Clark and inexplicably asked him to have Spirit's IT Department retrieve Kastens' e-mail keystrokes.<sup>14</sup> *T.* 378-380; *GC* 23. Thereafter, on or about February 14, District 70's Secretary-Treasurer Lynne

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<sup>14</sup> Notably, before being shown a copy of her e-mail, Ledbetter at first denied ever asking Spirit to investigate Kastens' actions. *T.* 378.

Strickland sent a series of Kastens' and Lehman's Facebook posts to Directing Business Representative Molina, writing, "This is from my phone. The paper I gave you today has the date and time on it. He posted this new post tonight." *GC 14, T. 70-71*. On February 14, Molina then sent the Facebook posts to Spirit's Labor Relations Manager Clark. Although Molina contended that he actually received the Facebook posts from Spirit, not vice versa, *T. 63, 68-69*, documentary evidence clearly demonstrates otherwise. In fact, Clark's response to Molina's February 14 e-mail erases any doubt that Respondent sent Spirit Lehman's and Kastens' Facebook messages:

Frank, When I got these *I shredded the hard copies you gave me last Friday* because I thought this was more of the same but better larger quality so that I could print pictures. No [sic] of these images include the selfie from the shop. Can someone send me an electronic version of that? *By the way I've blocked out the to and from and labeled the prints as from a reliable source.*<sup>15</sup> *GC 14; T. 70-71*.

The extent of Respondent's active involvement in Spirit's investigation of Kastens and Lehman is further evident in Clark's February 24 e-mail, which reminded Molina to send Spirit a copy of the "selfie" (*GC 11*) that was eventually cited as a reason for Lehman's discharge. *GC 14*. Notably, although Molina testified that he did not have sufficient technical savvy to obtain Lehman's photograph independently, he did not deny that he gave Spirit a copy of the photograph after receiving it from someone else in his office.<sup>16</sup> *T. 63, 72*.

There is simply no rational explanation for Respondent's intimate role in Spirit's investigations of Kastens and Lehman, and Respondent offered no credible explanation for its representative's actions. Given Kastens' and Lehman's history of dissident activity, the inference is obvious.

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<sup>15</sup> Spirit's security report indicates that the Facebook posts were sent to Spirit "by a person wishing to remain anonymous." *GC 13*.

<sup>16</sup> Molina could not offer any explanation when asked why Clark asked him to obtain a copy of Lehman's photograph. *T. 73*.

Furthermore, considering Howard Johnson's undisputed history with Kastens and Lehman, his professed lack of animosity toward them is particularly absurd. *T.* 309. Although Johnson testified that he did not know that Kastens and Lehman were responsible for disseminating the video, it is impossible to take his testimony at face value and conclude that he is simply a grossly negligent representative who did not consider the video's source or comprehend that his actions might cause trouble for the individuals who sent the e-mail to Ledbetter. *T.* 292-293. As already previously discussed, Johnson was simply an unbelievable witness. For example, when asked *whether* he knew that Lehman and Kastens were responsible for disseminating the video, Johnson equivocated as follows:

You know, I don't know the cause of that. I don't remember that. I mean I really don't. I mean I was more concerned of it being out, you know, that anything because, you know, after that happened I had a lot of maintenance guys call me. And everybody has called me and asked of me what's this doing out? *T.* 292.

When asked how long he knew Kastens, Johnson took the opportunity to impugn Kastens by claiming that he "saved his job a couple of times" even though he later admitted that he did not even handle so much as suspension grievances. *T.* 299, 311. It is certainly no coincidence that Johnson sent a copy of the video that was disseminated by Kastens, a known supporter of the reform candidates, and Lehman, Johnson's own former political opponent.

It is likewise impossible to credit Ledbetter's claim that she had no intention of causing Spirit to investigate Kastens' and Lehman's conduct and instead only wanted Johnson to help her get the video off the floor. *T.* 343. Like Johnson, Ledbetter clearly made no effort to constrain her testimony to actual facts. When asked if she ever asked Spirit to investigate Kastens' actions,

Ledbetter denied the fact despite clear evidence that she had done just that only a month before Spirit suspended Kastens and Lehman.<sup>17</sup> *T.* 378; *GC* 23.

The record clearly demonstrates that Respondent's representatives sought to initiate disciplinary action against Kastens and Lehman because of their dissident conduct. The timing of Johnson's e-mail -- almost immediately after receipt and before there is any evidence of an employee complaint -- along with Respondent's other attempts to initiate investigations against Kastens and Lehman demonstrate Respondent's hostility toward their activities. Considering Respondent's asserted justification is a pretext, its failure to advance a legitimate, non-discriminatory basis for Johnson's actions supports the inference that Respondent's representatives were discriminatorily motivated. See, e.g., *Huck Store Fixture Co.*, 324 NLRB 119, 120-121 (2001) (inferring unlawful motivation based on a respondent's unsupported defense).

### **5. Respondent Caused Lehman's and Kastens' Discharge**

Although neither Johnson nor Ledbetter specifically asked Spirit to discharge Kastens or Lehman, it is unnecessary to find an actual request to conclude that Respondent's actions violated Section 8(b)(1)(A) and (2). Evidence of an express demand is unnecessary to support a violation of Section 8(b)(1)(A) and (2) where the evidence otherwise supports a reasonable inference that Respondent sought to initiate discipline. See *Service Employees Local 87 (Able Building Maintenance Company)*, 349 NLRB 408, 411-412 (2007). The Board has found violations of Section 8(b)(1)(A) and (2) in cases in which union agents reported employees' conduct to employers in situations in which disciplinary action was simply reasonably likely to

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<sup>17</sup> When Lehman spoke with Ledbetter while filing his grievance, she falsely told him that she did not know why he had been suspended. *T.* 240-214.

ensue. See, e.g., *Town and Country Supermarkets*, 340 NLRB 1410, 1411-12 (2004) (concluding that the union reported a threat of physical harm by an employee based on his dissident activity); *Bang Printing*, 337 NLRB at 662, 664 (causing discharge by reporting unsubstantiated sexual harassment allegation because of dissident activity).

Even assuming that Respondent's representatives were not certain that discipline was likely to ensue when they decided to send Kastens' and Lehman's e-mail to Spirit, it is vital to remember that their actions were not confined to this single instance of reporting Kastens' and Lehman's actions to Spirit. As previously addressed, Johnson's e-mail was preceded by Ledbetter's January 13 request that Spirit audit Kastens' e-mails and followed by Molina providing Spirit the employees' Facebook posts and Lehman's in-plant photograph. Under the circumstances, there is simply no way to conclude that Respondent's representatives did not intend for Spirit to discipline Kastens and Lehman. Instead, the record clearly shows that Respondent's representatives were actively engaged in a campaign to give Spirit the ammunition to discipline Kastens and Lehman, and they eventually succeeded in their efforts.

Rather than seeking to represent Kastens and Lehman, Respondent's representatives clearly abdicated their fiduciary responsibility and instead focused on assisting Spirit in obtaining evidence to support disciplinary actions against them. The record clearly demonstrates that Respondent's representatives willingly used Spirit's labor relations department as a means of retaliating against dissident members. Accordingly, the evidence clearly demonstrates that Respondent sought to cause and caused Spirit to take disciplinary action against Kastens and Lehman and thereby violated Section 8(b)(1)(A) and 8(b)(2).<sup>18</sup>

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<sup>18</sup> Although Johnson sent Kastens' and Lehman's e-mails to Spirit more than six months before Kastens' filed the first amended charge in this matter, the record clearly indicates that Kastens did not know, and had no reason to

***D. Respondent Failed to Fairly Represent Kastens***

**1. Legal Framework**

Pursuant to Section 8(b)(1)(A), a union has a duty to represent all bargaining unit members “without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Although a union enjoys considerable discretion in processing grievances, it violates Section 8(b)(1)(A) when it acts to the detriment of a member or members of the bargaining unit for reasons that are arbitrary, discriminatory, or in bad faith. *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 75-78 (1991); *Teamsters Local 101 (Allied Signal)*, 308 NLRB 140, 144 (1992); *Auto Workers Local 909 (General Motors Corp.-Powertrain)*, 325 NLRB 859, 865 (1998).

Even without evidence of a hostile motive, the Board will find a violation of Section 8(b)(1)(A) if a union processes a grievance in a perfunctory or arbitrary manner. See *Union of Sec. Personnel of Hospitals*, 267 NLRB 974, 980 (1983). The Board considers a union’s actions to be arbitrary if they are “so far outside a wide range of reasonableness as to be irrational”<sup>19</sup> or found to demonstrate “something more” than mere negligence.<sup>20</sup> As the Board has noted, the “something more than negligence” standard is not susceptible to precise definition but must be analyzed by the particular facts of each case. *Office Employees Local 2*, 268 NLRB 1353, 1355 (1984). Although it is well settled that “an employee is subject to the union’s discretionary power to settle or even abandon a grievance,” the union must exercise its discretion in good faith.

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know, about his action until the time he filed the amended charge. *T. 199; GC 1-F*. These circumstances warrant tolling the 10(b) period. See *Oregon Steel Mills*, 291 NLRB 185, 192 (1988) (“Section 10(b) does not bar any allegation that was not within the knowledge of or which could not have been discovered by the charging parties with reasonable diligence.”).

<sup>19</sup> *Steel Workers (Cequent Towing Products)*, 357 NLRB No. 48, slip op. at 2 (2011), quoting *Airline Pilots v. O’Neill*, 499 U.S. at 67 (1991).

<sup>20</sup> See *Truck Drivers Local 692*, 209 NLRB 446, 447-448 (1974).

*Teamsters Local 528 (Walsh Construction)*, 272 NLRB 28, 28 (1984), citing *Vaca v. Sipes*, 386 U.S. at 190. Finally, regardless of the apparent merits of a grievance, the Board will find that a union violates Section 8(b)(1)(A) if it abandons a grievance for invidious reasons. See *Bottle Blowers Local No. 106*, 240 NLRB 324, 324-326 (1979).

Considering Respondent's active involvement in causing Kastens' discharge, the manner in which it processed his grievance warrants heightened scrutiny. This is not a case in which Respondent simply made a reasoned decision that it would not arbitrate Kastens' discharge. Rather, the evidence overwhelmingly demonstrates that Respondent actively stacked the deck against Kastens (and, for that matter, Lehman) and then processed Kastens' grievance in a manner that was intended to mask its unlawful motive and actions.

As Respondent's ultimate decision maker, Directing Business Representative Frank Molina's credibility is clearly in issue, and the totality of his testimony demonstrates that he simply cannot be taken at his word concerning the manner in which he processed Kastens' grievances. Although Molina cited a personal friendship with Kastens and Lehman as the reason he assumed the responsibility for processing their discharge grievances, *T. 36, 87-88*, the record tells an entirely different story. As described below, Respondent's entire defense rests on a foundation of mischaracterizations of Kastens' disciplinary history and a nonexistent investigation into his discharge.

## **2. Molina's Processing of Kastens' Suspension Grievances Demonstrates Respondent's Bad Faith**

Molina and Respondent suggest that Kastens' discipline history severely limited Respondent's ability to do anything other than concede his discharge. This simply is not true. Although Kastens' February 14 suspension was not his first offense, the evidence does not

support Molina's assertion that Kastens' discharge was a fait accompli because of his work record.

Kastens received verbal and written warnings for parking violations in March and May 2013, *Jt. 10, pp. 4-5*, and, because he did not grieve these disciplinary actions, when he failed to report his absence from work on November 4, 2013, Spirit issued him a three-day suspension on November 8, 2013. *Jt. 10, p. 3*. Thereafter, in late December 2013, Kastens was again suspended when Spirit's managers accused him of misusing company time and misrepresenting himself as a union steward. *Jt. 10, p. 4*.

Although Spirit certainly considered Kastens' previous suspensions in deciding to discharge him in March, Respondent completely ignores the fact that Kastens had unresolved grievances concerning both suspensions when Spirit discharged him. As demonstrated below, the record establishes that, even though Kastens' November 2013 suspension was once all but removed from his record, and his December 2013 suspension remained dispute and subject to an open grievance, Molina never even attempted to investigate or resolve these issues before abandoning Kastens' grievances.

**a. Facts Concerning Kastens' Other Active Grievances**

In late October 2013, Kastens attended a week-long union training class in Maryland. *T. 129*. Although the class ended on November 1, Kastens arranged to stay the weekend and return to Wichita on November 4, 2013, as he had on two previous occasions without incident. *T. 129-132*. On this occasion, however, Kastens, who had been working in Seattle instead of Wichita the week before his trip, neglected to inform his managers that he intended to be absent on November 4. *T. 129-130*. Although Kastens mistakenly assumed that his absence would be



excused because he was attending a union function, his managers concluded that he was absent without leave and suspended him. *T. 132; Jt. 2.*

Kastens filed a grievance on November 8, 2013, claiming that his suspension was unjust and requesting that it be removed from his record or reduced to a written verbal warning, explaining, in pertinent part:

I was written up in May for parking, today I was written up and suspended for not informing management that I would be gone on Monday. (Two separate issues and my first offense-unjust)[.] I failed to notify management of my absence due to being in Seattle prior to my organizing 2 class. I scheduled my return flight for Monday weeks in advance as I have done on 2 previous occasions (past practice). I was also under the impression my day off was excused for union business. *Jt. 3, pp. 4-5; T. 130-131.*

Kastens gave his grievance to Local 839 In-Plant Representative Tim Johnson and explained that, although he neglected to inform management that he would be gone, he had requested later return flights on other occasions following his attendance at out-of-town classes without incident. *T. 131.* Johnson informed Kastens that he would address the matter. *T. 131.*

Thereafter, Kastens served only a one day suspension, returning to work after a Spirit representative called him and told him that he had been in communication with Kastens' Union. *T. 132, 543.* Several weeks later, Kastens spoke with Johnson and District 70 Business Representative Greg Treadwell, and Treadwell informed him that his grievance was all but resolved, explaining that, once Respondent received Spirit's signature on the agreement, his suspension would be removed from his record, and he would receive backpay for the day that he missed. *T. 134.*

On December 23, 2013, however, Spirit again suspended Kastens, claiming that he misused work time and misrepresented himself as a steward. *T. 139-141.* The incident leading to

Kastens' suspension occurred on December 19, 2013,<sup>21</sup> when, on his way out of work after finishing his shift, Kastens spoke with fellow employee Shane Harper because he heard that Harper and another employee, Angel Santana, had been in a physical confrontation the previous night. After speaking with Harper, Kastens drove to Spirit's HR facility to report that he had witnessed prior verbal confrontations between Harper and Santana that had not been addressed by management. *T.* 137-138. The following day, Kastens met with Spirit's security officers to explain what he knew about the situation. *T.* 138.

Kastens filed a grievance concerning his suspension on January 2. *Jt.* 5; *T.* 140-141. Kastens gave the grievance to Tim Johnson and explained that he did not represent himself as a steward or misuse company time but simply spoke to Shane Harper and then went to human resources after work to volunteer his testimony. *T.* 141; *GC* 6.

On January 6, Kastens returned to work and received written notification of his suspension for "misus[ing] company time and misrepresent[ing] yourself as a union steward in investigating an issue in the shop area when in fact you are not a union steward or union official." *Jt.* 4; *T.* 135-136. Although Kastens signed the disciplinary form, he utilized the "employee comments" section to explain why he felt that the discipline was unwarranted. *Id.*

Several weeks after returning to work, Kastens spoke with Johnson at the Local 839 office about the status of his grievances, and Johnson told Kastens that the Employer no longer seemed inclined to resolve his November 2013 grievance because of his December 2013

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<sup>21</sup> Kastens testified that the incident occurred the Thursday before Christmas, which, in 2013, was December 19. *T.* 137.

suspension. Thereafter, about February 6,<sup>22</sup> Johnson transferred Kastens' grievances to District 70 for further processing. *T. 142-143; Jt. 3, p. 6; Jt. 5, p. 3.*

**b. Molina's Misleading Testimony Concerning Kastens' Prior Discipline**

The evidence ultimately fails to demonstrate that Molina did anything to process Kastens' suspension grievances. Although Molina's testimony suggested that he reviewed Tim Johnson's notes concerning Kastens' prior suspensions, and, satisfied with Johnson's efforts, found no basis for independently investigating the matters, *T. 561-562*, the evidence does not support his testimony. Although Tim Johnson initially processed Kastens' November 2013 grievance (*Jt. 3*) and his January 2014 grievance (*Jt. 5*), he submitted those grievances to District 70's office on February 6 after Spirit declined to resolve them. *T. 30-33, 142-143; Jt. 3, p. 6.; Jt. 5, p. 3.* Notably, Johnson's notes clearly reflect that Spirit did not provide any information during his investigation. *Jt. 3, p. 6; Jt. 5, 3.* Despite this fact, there is no evidence that Molina ever even attempted to follow up with Kastens or Spirit concerning the unresolved grievances, and Molina also failed to offer any explanation why he decided to abandon the grievances.

Instead of addressing why he decided to abandon Kastens' November 2013 grievance even though Spirit had once been close to settling it in Kastens' favor, Molina attempted to falsely characterize Kastens' unexcused absence in far more nefarious terms, testifying that Spirit Manager Robbin Kettermann suspended Kastens because Kastens attempted to get Molina and Becky Ledbetter to falsify documents so that his absence would be excused *T. 92, 103-104, 122*. Not only was Molina's testimony contradicted by Kettermann, who simply testified that she suspended Kastens because he did not have approved leave, *T. 466*, but it also was not

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<sup>22</sup> The letters are misdated and indicate that they were sent in 2013 rather than 2014. *T. 142.*

corroborated by Assistant Directing Business Representative Ledbetter, who was more intimately involved in Kastens' leave request. Ledbetter simply testified that she was unable to excuse Kastens from work on November 4 because he was no longer on official business. *T.* 349-351. Molina's claim that Kastens' tried to falsify documents is also squarely at odds with Respondent's own business records. Respondent's e-mail records demonstrate that as early as May 2013, Kastens notified Respondent's representatives that he intended to remain in Maryland the weekend following his October 2013 training class. After being advised that he did not need to make any arrangements until he scheduled his flights, Kastens registered for the class. *R.* 8, *pp.* 7-8. Then, once Kastens returned from the trip and his November 4 absence became an issue, he simply sought further clarification concerning whether his absence would be excused by Respondent, whether he needed to request leave, or whether he should simply accept the disciplinary consequences of his absence from work. *R.* 8, *pp.* 12-14.

Although Kastens may have been guilty of misunderstanding Spirit's leave policies, the evidence certainly does not corroborate Molina's assertion that Kastens attempted to get Respondent's representatives to falsify documents. Molina's willingness to mischaracterize the basis for Kastens' November 2013 suspension not only raises significant doubts about his credibility, but it also demonstrates his total lack of familiarity with Kastens' grievance file.<sup>23</sup> In fact, Molina's ignorance of Kastens' disciplinary history is highlighted by his testimony that he spoke with Robbin Ketterman in December 2013 and convinced her not to discharge Kastens because of his unreported absence. *T.* 92, 122. Kastens, of course, was suspended for the incident in early November 2013 and had already been reinstated at the time Molina purportedly saved his job.

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<sup>23</sup> Another example of Molina's false testimony concerning Kastens' discipline history is found in his claim that Kastens was disciplined multiple times in January. *T.* 566.

Like his testimony concerning Kastens' November 2013 suspension, Molina's testimony concerning Kastens' December 2013 suspension demonstrates his duplicity. Respondent contends that, as a result of his December 2013 suspension, Kastens independently agreed to a last chance agreement, thereby undermining Molina's ability to resolve his discharge. *T. 74, 85, 91; Jt. 4*. Although Kastens' *disciplinary action form* provides, "If you receive any type of discipline in the next 12 months, you will be terminated for generally unacceptable misconduct," it was not a last chance agreement. *T. 74, 85, 91; Jt. 4*. Spirit's disciplinary action form instructions expressly provide, "[t]he employee's signature on the disciplinary memo merely indicates review and receipt, not necessarily agreement." *Jt. 4, p. 2*. In fact, as Kastens' former manager Robbin Ketterman explained, Spirit's managers include similar "last chance" language on nearly all disciplinary actions. *T. 465*. Further dispelling the notion that Kastens signed a last chance agreement, when Kastens signed the January 6 suspension notice, he added the following comments:

I wasn't representing myself as a steward, I had information that I felt security needed to know is all. Also, when I spoke with Shane Harper I simply asked him how he was doing because the day before he was really angry. I did this as I was leaving the building, therefore it wasn't done on company time! *Jt. 4, p. 1; T. 135*.

Molina clearly knows the difference between a disciplinary form and a last chance agreement. *T. 123-124; GC 18; GC 19*. Yet, Molina repeatedly testified about the impact of Kastens' "last chance agreement" and claimed to have exhaustively researched arbitration decisions concerning that issue prior to determining to abandon Kastens' grievance. *T. 97, 114-115; R. 11*. In fact, Molina even cited Kastens' "last chance agreement" when informing Kastens of Respondent's decision to abandon his grievance. *T. 74, 85, 91, 97, 114-115*.

The evidence clearly establishes that Molina had no desire to actually represent Kastens. Instead of actually reviewing Kastens' open grievances, Molina simply chose to ignore them and instead mischaracterize Kastens' disciplinary history to support his refusal to contest Kastens' discharge. As a result of Molina's actions, Kastens' November 2013 grievance was never finally settled and Kastens' January grievance Molina's actions fall well short of his statutory responsibilities. See, e.g., *Service Employees Local 579 (Beverly Manor)*, 229 NLRB 692, 695 (1977) (finding union handled grievance in a perfunctory manner by failing to question the reason for an employee's discharge).

### **3. Molina's Processing of Kastens' Discharge Grievance Further Demonstrates Respondent's Bad Faith**

The manner in which Molina investigated Kastens' discharge further demonstrates his complete lack of good faith. Although Molina submitted a request for information to Spirit on February 27, *T. 37, 40-42, 548-551; GC 7; GC 9*, his subsequent actions were nominal and appear to have been merely aimed at presenting the appearance of an honest investigation. In fact, upon reviewing Molina's testimony about his investigation, it becomes clear that he had no intention of actually representing Kastens.

First, it bears noting that, in many instances, it is nearly impossible to decipher Molina's testimony concerning what his investigation actually involved. At various times, Molina was either unable or unwilling to recall which documents were included in Kastens' grievance file or when he first reviewed the documents. *T. 33-35, 46-57, 65-66, 559-560*. In other instances, Molina's testimony was either contradictory or objectively untrue, involving recollections of events that clearly did not happen. For example, Molina initially testified that as soon as Kastens

and Lehman filed grievances concerning their suspensions, he contacted Howard Johnson<sup>24</sup> and instructed Johnson that he intended to handle their grievances. *T.* 87. In later testimony, however, Molina completely changed his story and claimed that he did not begin processing Kastens' grievance until after Kastens' discharge because Tim Johnson conducted the initial investigation.<sup>25</sup> *T.* 546-547, 565-567.

Second, contrary to Molina's claim that he actively exchanged information with Kastens about his grievance because he sought "to make sure I wasn't missing something, if there was something else out there," *T.* 548, 553, the record demonstrates that Molina made little effort to communicate with Kastens about the facts of his case. In fact, aside from contacting Kastens in mid February and generically informing him that his suspension involved an e-mail, there is no reliable evidence that Molina ever had any substantive communications with Kastens about his grievances. Although Molina claimed to have "a lot of notes" describing his interviews with Kastens, *T.* 559-560, Respondent did not introduce a single document to support his testimony. Kastens denied that Molina ever interviewed him about his suspension and discharge, *T.* 153, 199-200, 572, and Kastens' records demonstrate that when he sent several text messages to Molina concerning his grievance, Molina either provided a cursory response or did not respond at all. *GC* 3; *T.* 151-152. Most compelling, on March 8 Molina e-mailed his staff to inform them that Kastens would be bringing a copy of his termination paperwork, and included the instruction: "absolutely no other paperwork from his file is to be released to him irregardless

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<sup>24</sup> Johnson denied having such a conversation with Molina. *T.* 299.

<sup>25</sup> The date of Molina's information request obviously contradicts his testimony that he did not begin handling Kastens' grievance until after he was discharged on March 5. Furthermore, despite Molina's claim that Johnson initially handled Kastens' discharge grievance, *T.* 546-547, 561-562, 565-567, the evidence does not support this assertion. Johnson did not attend Kastens interview with Spirit's security department on February 25, and there is no evidence that Johnson even spoke with Kastens about his discharge, as Kastens testified. *T.* 572-573. Respondent, of course, provided no documents that contradict Kastens' testimony.

[sic] of what he says none of his paperwork is to be released to him from me or from the district.... Without my approval!” *GC 10; T. 43-44*. Molina was clearly more concerned with shielding information from Kastens than with obtaining information that might exculpate him.

Third, although Molina testified that he honestly attempted to evaluate Kastens' grievances, the record simply does not support his testimony. As previously addressed, Molina clearly appeared to know very little about the circumstances of Kastens' November and December 2013 suspensions. Furthermore, Molina could not answer many fundamental questions about the incident that led to Kastens' discharge. For example, Molina testified that he could not get “any solid answers” how Spirit's confidential video found its way to Lehman and Kastens. *T. 59*. Similarly, Molina did not know whether any other employees had been disciplined as a result of the video's dissemination. *T. 59-60*.

The credibility of Molina's investigation is also severely undermined by his claim that he had no knowledge that Howard Johnson was responsible for sending Kastens' e-mail to Spirit until sometime after he settled Kastens' grievance. *T. 48-56, 83; GC 17*. Considering Molina's intimate involvement in transmitting other evidence against Kastens and Lehman to Spirit,<sup>26</sup> his professed lack of knowledge concerning the manner in which Spirit obtained Kastens' e-mail is simply unbelievable. As Spirit Senior Security Manager Jason Neal testified, Spirit does not maintain redacted copies of its security reports, *T. 273-275*, and it defies reason, as Molina apparently claims, that Spirit sent Molina a security report that included every page but the one page that showed that Johnson transmitted Kastens' e-mail to Spirit. *GC 17*. One cannot imagine a single reason to explain why Spirit's managers would feel it necessary to protect Johnson's

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<sup>26</sup> Not only did Molina take an active role in sending Spirit Kastens' and Lehman's Facebook posts, *GC 14*, but Ledbetter also copied him on her January 13 e-mail requesting access to Kastens' email activity. *GC 23*.



identity from Molina or Respondent's other officers. Even had Spirit done so, it is simply unimaginable that Molina would not have investigated the issue unless he already knew the answer.<sup>27</sup>

Fourth, although Molina sought Attorney Tom Hammond's counsel concerning the disposition of Kastens' (and Lehman's) discharge grievance, the record clearly indicates that he was not interested in an honest evaluation of the merits of Kastens' case. Despite falsely testifying that he submitted Kastens' *entire* grievance file to Hammond, *T. 87*, Molina actually neglected to send Hammond copies of Kastens' November 2013 and January 2014 grievances. *T. 499-503*. As a result, Hammond incorrectly assumed that Kastens' November and December 2013 suspensions were not subject to active grievances, and he mistakenly concluded that Kastens' unchallenged discipline precluded Respondent from challenging his subsequent discharge. *T. 487-488, 495-496; R 6*. Thus, although Hammond testified that he considered it unlikely that Respondent could prevail in arbitration because Kastens' most-recent discipline (*Jt. 4*), his analysis was based only on those documents that Respondent elected to share with him. *T. 495*. Clearly, Respondent cannot utilize Hammond's advice as an endorsement of its decision to abandon Kastens' grievances when it withheld information from him that would have altered his analysis.

Finally, the evidence concerning the way in which Molina negotiated Kastens' settlement demonstrates his utter lack of good faith. Notwithstanding Molina's claim that he met with Vice President of Labor Relations Justin Welner to attempt to resolve Kastens' grievance, credible evidence simply does not support his blatantly false testimony. Whereas Molina claimed that

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<sup>27</sup> It bears repeating that when one compares GC 13 and GC 14, it appears that Spirit intentionally concealed the fact that Molina was the source of Kastens' and Lehman's Facebook posts.

Welner rejected his claim to reinstate Kastens because of Kastens' repeated poor conduct,<sup>28</sup> *T. 100-102*, Welner unequivocally testified that he did not have any involvement in Kastens' grievance and only had limited knowledge of why Kastens had even been discharged. *T. 512, 515*. Furthermore, even though Molina actually obtained a nominal settlement for Kastens, the record clearly demonstrates that he made no attempts to involve Kastens in the settlement process. Despite Molina's claims that he apprised Kastens of his decision not to seek arbitration before reaching a settlement agreement with Spirit, more reliable evidence contradicts his testimony.<sup>29</sup> In fact, although Spirit initially sought to seek Kastens' concurrence in the settlement, once Molina reviewed Spirit's proposal, Spirit agreed to remove the grievant release. *GC 15*.

Considering the numerous discrepancies in Molina's testimony, it is impossible to take it on faith, as Respondent asks, that Molina honestly processed Kastens' grievances. Time and time again Molina provided contradictory and unabashedly false testimony concerning Kastens' disciplinary history, his grievances, and Respondent's investigations. Considering the clear animus directed at Kastens' dissident union activities by Respondent's representatives (Molina included), the record certainly supports the inference that Molina was discriminatorily predisposed to abandon Kastens' grievances, thus denying him any opportunity of obtaining reinstatement from the discharge Respondent worked so hard to initiate.

Even assuming that one concludes that the record does not establish that Respondent abandoned Kastens' grievances because of his dissident activities, the substance of Molina's

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<sup>28</sup> According to Molina's testimony, Welner knew Kastens' and Lehman's names even before Molina walked into his office to seek their reinstatement. *T. 101-102*.

<sup>29</sup> Even Molina's testimony was contradictory. He first claimed to have spoken with Kastens, and then changed his testimony and said he may have been unable to get in touch with Kastens for some reason and instead left a voicemail message. *T. 558*. As previously discussed, Kastens' text message records and Respondent's own e-mail records tell a different story. *GC 3; GC 10*.

testimony clearly demonstrates that he processed Kastens' grievances in a perfunctory manner. Although the Board does not require a union to investigate every complaint or deem the mere mismanagement of a grievance to be a violation of Section 8(b)(1)(A),<sup>30</sup> Molina's conscious disregard of the facts clearly demonstrates his complete lack of good faith. At its essence, Section 8(b)(1)(A) imposes the affirmative obligation that, when a union undertakes a grievance, its decision-making process must be fair and honest. See *General Truck Drivers Local 315 (Rhodes & Jamieson, Ltc.)*, 217 NLRB 616, 618-619 (1975). Under the circumstances, there can be no doubt that Respondent utterly failed to meet its obligations of representing Kastens fairly.

#### IV. CONCLUSION

For the forgoing reasons, the General Counsel respectfully submits that the evidence establishes Respondent's representatives violated Section 8(b)(1)(A) by threatening Ryan Kastens with bodily injury and by threatening to impede his efforts to obtain reinstatement; Respondent violated Section 8(b)(1)(A) and (2) by attempting to cause and caused Spirit to discharge Kastens and Jarrod Lehman; and Respondent violated Section 8(b)(1)(A) by discriminatorily and/or arbitrarily processing Kastens' outstanding grievances. As part of the remedy for Respondent causing Kastens' and Lehman's discharge, the General Counsel seeks an Order requiring that Respondent make Kastens and Lehman whole for the loss of earnings and other benefits they suffered as a result of their suspensions and discharges beginning on February 14, 2014, until such time as the employees are reinstated by Spirit or the employees obtain other substantially equivalent employment.

The General Counsel further requests, as part of the remedy for Respondent's failure to fairly process Kastens' grievances, and that Respondent be ordered to promptly request that

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<sup>30</sup> *Diversified Contract Services*, 292 NLRB 603, 605-606 (1989).

Spirit reinstate Kastens to his former position or, if that position no longer exists, to a substantially equivalent position. If Spirit refuses to reinstate Kastens, the General Counsel seeks an Order requiring Respondent, among other things, to request that Spirit process the grievances over Kastens' suspensions and discharge and to pursue the grievances in good faith with due diligence, including permitting the Kastens to have counsel or another representative of his own choosing present at the grievance-arbitration proceedings at Respondent's expense. If it is no longer possible for Respondent to pursue Kastens' grievances and, if the General Counsel shows in a subsequent compliance proceeding that a timely-pursued grievance on those issues would have been successful, the General Counsel also requests that the Respondent be ordered to make Kastens whole for any loss of earnings and other benefits suffered as a result of his suspensions and discharge until such time as the Kastens is reinstated by Spirit or he obtains other substantially equivalent employment.

Dated: April 3, 2015

Respectfully submitted,

A handwritten signature in dark ink, appearing to be "M Werner" followed by a flourish, positioned above a horizontal line.

Michael E. Werner and

Julie Covell

Counsel for the General Counsel

**STATEMENT OF SERVICE**

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Brief to the Administrative Law Judge pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Division of Judges with service by electronic mail on the parties unless otherwise indicated.

Dated: April 3, 2015

A handwritten signature in black ink, appearing to read "M. E. Werner", is written over a solid horizontal line.

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